NO. 22455

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROMAN LUGO RODRIGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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STATEMENT OF JURISDICTION AND PROCEEDINGS

This is an appeal by the defendant Rodriguez, pursuant to 18 U.S.C. §§1291, 1294 from a conviction for violations of 21 U.S.C. §174 and 26 U.S.C. §4705(a).

On January 11, 1967 the United States Grand Jury for the Central District of California returned a nine count indictment charging the defendant and two others, Andrew Aguilar and Aurora Contreras Aguilar, with violations of federal narcotics statutes. The defendant was charged only in Counts Seven, Eight and Nine as follows:

In Count Seven, with unlawfully receiving, concealing and

facilitating the concealment and transportation of a quantity of illegally imported heroin; in Count Eight with unlawfully selling and facilitating the sale of this same heroin to Agent Edward A. Heath of the Federal Bureau of Narcotics; and in Count Nine, with unlawfully selling this same heroin to Agent Edward A. Heath without obtaining a written order on a form issued for that purpose (C. T. 2-10).[1/]

On March 3, 1967 the defendant waived a trial by jury and special findings of fact (C. T. 20, 21).

On March 9, 1967, the trial commenced before the Honorable John W. Delehant. The trial was concluded the same day and the court found the defendant guilty as charged in Counts Seven, Eight and Nine (C. T. 22). On March 16, 1967, the defendant was sentenced to concurrent five year terms of imprisonment on Counts Seven, Eight and Nine. The defendant moved for a judgment of acquittal and the court denied the motion (C. T. 23, 24).

On March 16, 1967, the defendant filed a Notice of Appeal herein (C. T. 28).

On about October 17, 1968 the defendant's court appointed counsel, Willis Peck, filed a "Supplemental Brief in Support of Motion to Withdraw as Court Appointed Counsel on Appeal". On October 29, 1968, this court relieved Willis I. Peck of his appointment to represent appellant. This brief is filed in response

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1/ "C. T." refers to Clerk's Transcript.

to a letter from the Clerk of the United States Court of Appeals for the Ninth Circuit, dated December 5, 1968, requesting an answering brief be filed to the brief submitted by Mr. Peck.

STATEMENT OF THE EVIDENCE

Albert E. Marmolejo,[2] a Government informer, testified (R.T. 28, 29).[3] Andrew phoned him about 10:00 a.m. on December 17, 1966 and said that he had received a call from Mexico that the heroin was on the way. He went to Andrew's house only once on December 17, 1966 in the evening (R.T. 58-60). Ten persons were present when he arrived including Andrew's common-law wife, her four children, defendant Rodriguez's wife and three or four children, and Aurora and her two children. Defendant Rodriguez was present, but they were not introduced. Andrew was not there. Marmolejo was not told he would have to leave. He and Andrew's wife had a short conversation and he sat down to wait for Andrew (R.T. 44, 45, 58-60). Five minutes later Andrew arrived. Defendant Rodriguez walked toward Andrew and Marmolejo got up. Andrew introduced Marmolejo to defendant Rodriguez saying, "This is the guy that

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2/ In this brief, the following abbreviations are used: co-defendant Aurora Contreras Aguilar is "Aurora", co-defendant Andrew Aguilar is "Andrew", witness Albert E. Marmolejo is "Marmolejo", and appellant Roman Lugo Rodriguez is "defendant Rodriguez" or "defendant".

3/ "R.T." refers to Reporter's Transcript.

brought the stuff from TJ." Are you sure that the deal is going to go down tonight? Marmolejo replied, yes he was pretty sure it would (R.T. 30-34, 45-46). This conversation was in English (R.T. 46-47). Andrew did not tell Marmolejo to leave or say that Marmolejo was unwelcome when Andrew was not around (R.T. 58-60).

On Andrew's instruction, Andrew, Marmolejo and defendant Rodriguez went into the bedroom. Defendant Rodriguez produced a cellophane wrapped package containing eight balloons which he handed to Andrew (R.T. 34, 35, 38, 47, 48). The conversations in the bedroom with defendant Rodriguez were in Spanish (R.T. 49, 50). Andrew said that defendant Rodriguez had just arrived from Mexico with the heroin for the sale that was to take place that evening (R.T. 30). Andrew opened the package and took out a small quantity of heroin. Rodriguez asked what Andrew was going to do with the heroin, and said it was pure. Andrew said he was going to take some and see how good it was (R.T. 35, 36, 49, 50). Andrew left the bedroom while defendant Rodriguez and Marmolejo stayed behind (R.T. 36). Defendant Rodriguez asked Marmolejo if Marmolejo had the money for the purchase. Marmolejo replied that he did not but that the sale would take place that evening. Defendant Rodriguez asked about the money a couple of other times and said that he could not allow the heroin out of his sight, that when the transaction occurred, it would have to take place in his presence. Defendant Rodriguez asked if Marjolejo was the buyer, and Marmolejo said he was not

(R. T. 37, 50-53). Andrew returned to the bedroom and said that the heroin was pure. Andrew removed another quantity, and in response to defendant Rodriguez's question, Andrew said this was for his part in setting up the sale (R. T. 37).

As they all left the bedroom defendant Rodriguez said that he had to know what was going on when the buy was going to be made, that he could at no time let the heroin out of his sight, and that he had to have the money before he could let the heroin out of his possession (R. T. 37). Defendant Rodriguez retained possession of the bulk of the heroin (R. T. 38). The conversation ended and Marmolejo then left the residence (R. T. 37).

Arrangements were made for the sale to take place that evening at the Montebello bowl (R. T. 39, 40).

That evening, about 10:00 p. m., he saw defendant Rodriguez, Andrew, and Aurora arrive at the Montebello bowl in a Ford driven by defendant Rodriguez. He went to the car and spoke to Andrew and Aurora. He asked Andrew if he had the heroin. Andrew said yes and asked if Marmolejo had the money. Marmolejo said they did. Andrew asked if Marmolejo had the money on him and Marmolejo said no, that Agent Heath was going to make the buy. At that time Agent Heath was standing fifteen or twenty yards in front of the car. Marmolejo was on the passenger side. Defendant Rodriguez then asked if Marmolejo had the money and Marmolejo said no, that the buy had to be made through Heath. Defendant Rodriguez then asked if Heath could come to the car so the buy could be made. Andrew said this could not be done because

Andrew and Heath had had a misunderstanding on an earlier occasion, and that Aurora was with them so she could make the buy with Heath. Defendant Rodriguez said he couldn't let the heroin out of his sight. Andrew said that the transaction would take place in front of the car where they could see the money and the heroin change hands. Aurora left the car. Defendant Rodriguez handed the heroin to Andrew and Andrew handed it to Aurora. Aurora and Marmolejo then walked over to Heath and Aurora handed Heath the heroin. Heath put it on the hood of the car and opened the package and looked at it. At that time the arrests were made (R. T. 41-43, 53-55, 65).

On cross-examination, Marmolejo specifically denied being at Andrew's house more than once on December 17, 1966, and he denied going for a fix on that afternoon with Andrew and Aurora (R. T. 58-60).

Edward A. Heath, a federal narcotics agent, testified that he arrested defendant Rodriguez on December 17, 1966 at about 10:00 p. m. in the parking lot of the Montebello bowling alley (R. T. 11, 12). Before the arrest he saw defendant Rodriguez in the company of Andrew and Aurora. Other narcotics agents and Marmolejo were also present (R. T. 12). Defendant Rodriguez arrived at the parking lot, driving a 1958 red and white Ford, with Andrew and Aurora as passengers (R. T. 13). Defendant Rodriguez parked the Ford, and Marmolejo and Heath walked towards it. Heath stopped about twenty yards away and Marmolejo walked to the Ford and spoke with the occupants (R. T. 13).

Defendant Rodriguez and Andrew remained in the automobile and Aurora left the car (R. T. 27, 28). Marmolejo and Aurora then returned to Heath where Aurora and Heath negotiated the sale of eight ounces of heroin for $1600 (R. T. 13). Aurora then handed Heath a package which contained 162.1 grams of heroin (R. T. 13). Neither Aurora nor anyone else asked Heath for a written order form (R. T. 62). Aurora, Andrew and defendant Rodriguez then were arrested (R. T. 14).

Neither defendant Rodriguez, Andrew nor Aurora asked Marmolejo for an order form pertaining to the heroin. He neither gave them one nor received one from them (R. T. 61).

The package received by Heath from Aurora was identified by Marmolejo as the same one that Marmolejo saw defendant Rodriguez give Andrew at Andrew's house. A field test showed the package contained an opium derivative, and the chemist identified the substance as heroin (R. T. 14-27, 34, 35, 63-64).

The Government rested (R. T. 64).

Aurora, a defense witness, gave conflicting testimony. She arrived at Andrew's house at about 11:00 a. m. on December 17, 1968. She was at the house most of the rest of that day. She saw Marmolejo, whom she knew as Pudgie, three times that day (R. T. 68-70, 79). First, she saw him in the morning when they went to score; next she saw him when he and a friend came to Andrew's house, while Andrew and Rodriguez were at the store, and finally she saw him when the transaction took place (R. T. 69). On the first occasion, they met about 1:00 or 2:00 p. m. at

Andrew's house. She, Andrew and Pudgie went to score and fix. They fixed at Andrew's house. The fix was not a strong one and lasted only an hour or an hour and a half (R. T. 69, 70, 80-84).

She first saw the package containing the heroin around 4:00 p. m. on December 17 in Andrew's bedroom. The package was wrapped in a paper bag (R. T. 73-74, 79). At 4:00 p. m. she scored again, when Andrew opened the package (R. T. 84). Defendant Rodriguez was not present at the time. The fix at 4:00 p. m. was a pretty good fix, although she didn't take too much because she knew about the sale (R. T. 85). That was the last fix she took that day or that evening. She didn't recall how long the fix lasted but she believes it was two or three hours (R. T. 86).

Defendant Rodriguez arrived about 5:30 p. m. or 6:00 p. m. from Mexico. He arrived before Marmolejo came over the second time (R. T. 72-74). Defendant Rodriguez then left with Andrew, and while they were gone, at about 6:00 p. m., Marmolejo and another man arrived at Andrew's house. As Marmolejo entered she asked him if Andrew knew he was coming. Marmolejo said no but the man with him wanted some heroin. She said Andrew wasn't here and she didn't think Andrew wanted anybody brought to Andrew's wife's house. Marmolejo stayed and when Andrew and defendant Rodriguez returned, Andrew became upset.

Defendant Rodriguez and Marmolejo did not speak. Marmolejo and Andrew went into the hall where Andrew told Marmolejo that he, Andrew, didn't want Marmolejo and Marmolejo's friend there. Marmolejo and his friend left (R. T. 68-73).

She told Marmolejo to leave because the heroin was there and no one was supposed to come in. She didn't know how the heroin had gotten to Andrew's house. She did know that Andrew and defendant Rodriguez had gone to the store and that Rodriguez had arrived from Mexico on that day. The heroin arrived at the house before defendant Rodriguez did (R.T. 77-78). When Marmolejo was in the house, she already knew there was going to be a sale that evening (R.T. 90).

That evening Andrew, Aurora and defendant Rodriguez drove to the bowling alley. Andrew carried the package and they spoke in English so that defendant Rodriguez wouldn't learn what was going on. When they arrived at the bowling alley, Andrew left the car and approached Agent Heath and Marmolejo. Heath was behind Marmolejo. Andrew said he didn't want to meet with Agent Heath. Andrew and Marmolejo had a conversation and Andrew returned to the car. Andrew handed Aurora the package. Aurora got out and approached Heath and Marmolejo. She asked whether they had the money. When they said yes she returned to the car, took the package and carried it to Heath. She gave Heath the package. There was no conversation at all with the defendant Rodriguez, and Marmolejo never walked up to the car (R.T. 75-76, 91-92).

Roman Lugo Rodriguez, the defendant, testified. He is a citizen of Baja California and does not speak English. On December 17, 1966 he crossed the border about 2:00 p.m. and arrived in Los Angeles about 5:00 p.m. He was making a one

day trip to show Los Angeles to his family. He telephoned Andrew. Andrew came to the liquor store from which he had telephoned, and they returned to Andrew's house. Marmolejo was there and stayed about ten or fifteen minutes. He did not meet Marmolejo at Andrew's house and he had no conversations with Marmolejo. Marmolejo and Andrew conversed in English.

During the ride to the bowling alley, the only conversation he had involved receiving directions. Andrew and Aurora were with him. When they arrived he did not drive back and forth, but he parked the car. Andrew left the car and walked toward the front. Andrew then returned and Aurora left the car and she and Andrew had a conversation. Aurora then walked towards the front until she was with two men. Andrew got into the back seat of the car and didn't say anything. All of a sudden the police came to the car. No one came to his car to have a conversation with him, with Andrew or with Aurora. He did not know what heroin was. He did not bring any heroin into the United States and he did not know that there was heroin at Andrew's house or in the car (R. T. 94-107).

The defense rested (R. T. 107).

There was some rebuttal testimony by Agent Heath and by Agent Chris Saiz. In part, the rebuttal showed that, before stopping, the defendant's car drove through the parking lot three or four times, and that, after stopping, the first conversation took place at the car between Marmolejo and the three occupants (R. T. 107-121).

Both sides rested (R. T. 121).

ARGUMENT

I

THE EVIDENCE WAS PROPERLY ADMITTED AND IS SUFFICIENT TO SUSTAIN THE CONVICTION

The evidence is sufficient to sustain the defendant's conviction. Although insufficiency of the evidence is specified as error, no argument is made to support the specification. Even if the testimony to which objection is made is not considered, the remaining evidence is ample to sustain the judgment below.

The evidence included testimony that Rodriguez had the heroin in his possession, that he gave it to Andrew and that he held it until the sale. He discussed the heroin, and the pending sale arrangements with Marmolejo and Andrew. He drove Andrew and Aurora to the sale location, and, when the arrangements were verified, produced the heroin. Neither Marmolejo nor Heath had an order form.

Defendant's possession allowed the trier of fact to infer that the heroin was illegally imported and that the defendant knew it was illegally imported. 21 U.S.C. §174. The undisputed evidence that the defendant arrived from Mexico that day, when taken with his possession and knowledge of the sale, allows the inference that he had illegally imported the heroin. His possession of the heroin is a clear concealment (Count Seven), and his production for the sale is a clear act of sale (Count Eight). 18 U.S.C. §2. This evidence and the absence of an

order form sustain the third conviction in Count Nine. The trial issue was not the sufficiency of this evidence to establish the violations charged, but whether defendant was an innocent bystander or a participant. The court found he was a participant. Since defendant received concurrent sentences, the judgment below should be sustained, if any count has sufficient supporting evidence. Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960); Eason v. United States, 281 F. 2d 818 (9th Cir. 1960).

The statements and conversations admitted into evidence were correctly admitted. The conversations as to which defendant Rodriguez now claims error took place in the bedroom in Spanish among Andrew, Marmolejo, and defendant Rodriguez, or between Marmolejo and defendant Rodriguez (R. T. 48-53). See "Supplemental Brief in Support of Motion to Withdraw", p. 5, lines 6-23. This evidence was not objected to at the trial. And no claim is made in the brief that it is substantial error to have admitted any of them. A conversation in the defendant's presence is clearly admissible in evidence. United States v. Gypsum Co., 333 U.S. 364, 393 (1947).

The defendant did object to the admission of a conversation in English which took place before he went into the bedroom (R. T. 30-34). But the admission of this evidence was correct, and the objection was incorrect and properly overruled. The ground for the objection was that the testimony was inadmissible hearsay, that no foundation was shown and that no concert or conspiracy was shown. The defendant did not object on the specific

ground that, even if he were present, he would not be able to understand a conversation in English. Next, the defendant asserted a general objection, when the Government showed that he was present. Again, he did not raise any claim regarding his inability to understand English. At this point, the court offered him an opportunity to voir dire the witness. Defendant's attorney did not do so (R. T. 30-34). No motion was made to strike this testimony at any time during the trial. Any objection on the ground of defendant's inability to speak English must be considered waived.

This objection would have been incorrect. Defendant is unclear about what precisely he considers to be the hearsay evidence: the statement of Andrew to Marmolejo, or an alleged lack of response by the defendant to the statement. The argument, advanced by defendant, that he did not understand English, raises the question of an admission by silence, the defendant's lack of response. However, the Government did not ask whether or not defendant made any response and did not offer any lack of response. The lack of response, rather than the statement which precedes the response, is the evidence which is offered under the doctrine of admission by silence. See 29 Am. Jur. 2d 692, Evidence, §638, and IV Wigmore on Evidence (3rd Ed.) 79, §1072. So any claim that there was error in admitting defendant's lack of response must fail because it is unsupported by the record.

On the other hand, if the objection had been that the

improperly received evidence was Andrew's statement outside the bedroom in English, then any error was cured before the end of trial. The statement became admissible because it was shown to have been made during the course of, and in furtherance of, the conspiracy to import, receive, conceal and sell heroin. Independent evidence, Marmolejo's other testimony, established the conspiracy and defendant's participation. And a statement by Andrew, introducing the defendant as the importer and supplier, to Marmolejo, who was the contact with the ultimate buyer, is clearly made during the course of and in furtherance of the conspiracy.

In United States v. Gypsum Co., 333 U.S. 364, 393 (1947), the court held:

> "With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy. We think that all of the declarations and acts which we have set forth in this opinion are in aid of the ultimate conspiracy. We do not attempt to fix a date when the conspiracy was first formed. At least, the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929."

The common law on this subject is well summarized as follows:

> "Declarations and acts of one conspirator pursuant to or in the furtherance of the conspiratorial purpose are admissible in evidence against any other member of the conspiracy if there is at least prima facie proof of the conspiracy alleged by the prosecution . . . This rule is applicable in a prosecution for a substantive crime where conspiracy is incidentally involved as well as in a prosecution for the crime of conspiracy itself. The rule applies whether or not the conconspirator whose declarations are put in evidence is a codefendant of the conspirator on trial. The evidence is admissible against an original conspirator and also against one who joined the conspiracy after its inception.
>
> "Ordinarily declarations or acts of a coconspirator should not be introduced in evidence against another member of the conspiracy prior to prima facie proof of the existence of a conspiracy, but if the evidence in its entirety establishes the existence of a conspiracy, the order in which declarations or acts of a coconspirator are introduced in evidence loses its significance. Hence, the order of proof

of such matter is largely in the discretion of the trial judge." 16 Am. Jur. 2d 147, 148, Conspiracy, §38 (footnotes omitted.)

The admission of the statement in English before the evidence of the conspiracy was a matter of order of proof only. Braatelien v. United States, 147 F. 2d 888 (8th Cir. 1945).

CONCLUSION

The properly admitted evidence is sufficient to sustain the judgment below.

Respectfully submitted,

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